United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1329

United States Court of Appeals

FOR THE SECOND CIRCUIT

ISLAND CREEK COAL SALES COMPANY,
Plaintiff-Appellant,

—against—

INDIANA-KENTUCKY ELECTRIC CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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This brief is submitted on behalf of defendant-appellee Indiana-Kentucky Electric Corporation ("IKEC") in opposition to the appeal by plaintiff-appellant Island Creek Coal Sales Company ("Island Creek") from a judgment of the United States District Court for the Southern District of New York entered December 10, 1973 dismissing the complaint in this action (102a).

Counterstatement of Issues Presented

1. Whether the District Court properly held that Island Creek submitted to arbitration the question of its right to terminate the Coal Supply Agreement between it and IKEC, pursuant to Article IV, Section 6 of that agreement.

2. Whether, even if the dispute was not covered by the submission agreement, there are issues relating to the exercise by Island Creek of its right to terminate which are properly the subject of arbitration pursuant to the arbitration provision of the Coal Supply Agreement.

3. Whether the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§801, *et seq.* (1970) (the "Health and Safety Act") constitutes "regulations or restrictions" of the kind contemplated by Article IV, Section 6.

The District Court decided the first issue enumerated above in IKEC's favor and therefore did not reach the other two; they would, of course, have to be considered before the decision below could be reversed.

Counterstatement of the Case

Island Creek is appealing from a judgment of the United States District Court for the Southern District of New York, entered December 10, 1973 granting IKEC's motion for summary judgment and dismissing Island Creek's complaint. The judgment was entered pursuant to a decision and order of the Honorable Arnold Bauman, filed on November 21, 1973 (90a-97a).

Proceedings Below

This action was commenced by Island Creek on February 6, 1973, seeking a declaratory judgment that it had a right to terminate unilaterally a Coal Supply Agreement, dated December 19, 1966, entered into by IKEC and Island Creek (4a-10a). On April 25, 1973, IKEC brought a motion pursuant to Rules 12(b)(6) and 56(b) of the Federal Rules of Civil Procedure (11a). This motion was premised on the grounds that: (1) Island Creek had previously submitted

the question of its right to terminate the Coal Supply Agreement to arbitration by a valid and binding Joint Submission to Arbitration of June 10, 1971 (the "Submission"); (2) the language of the Coal Supply Agreement left to arbitration certain questions relating to the prerequisites for Island Creek's alleged right to terminate; and (3) Island Creek's termination could not be premised on the Health and Safety Act, or, at the least, that this question was also a proper subject for arbitration.

The decision of the District Court was based solely on the first of these grounds. Judge Bauman held that the Submission, whose language left little room for interpretation, was valid and binding on the parties and could only be construed as evidencing a clear intent on the part of Island Creek to submit to arbitration the issue of its right to terminate the Coal Supply Agreement pursuant to Article IV, Section 6. This conclusion was buttressed by the fact that the specific provisions relied upon by Judge Bauman were drafted by Island Creek and included in the Submission at Island Creek's insistence

The Facts

Island Creek, a Maine corporation, engaged primarily in the business of marketing coal mined by its parent, Island Creek Coal Company, entered into a Coal Supply Agreement, dated December 19, 1966 (10a-1—10a-48), with IKEC, a public utility incorporated under the laws of the State of Indiana, pursuant to which Island Creek was obligated to deliver, in substantially equal monthly installments through December 31, 1982, coal in the amounts specified in Article III of the Coal Supply Agreement (10a-9). Island Creek admittedly failed to deliver the amounts so specified in the years 1970 and 1971.

In Article VI, Section 12, of the Coal Supply Agreement, the parties agreed, with certain limitations, to submit to arbitration "any dispute, controversy or claim arising out of or relating to this Agreement." Article VI, Section 12, provides:

> "Except as to any matter expressly stated herein to be within the sole judgment of one of the parties hereto, any dispute, controversy or claim arising out of or relating to this Agreement shall be determined by arbitration in accordance with the rules then obtaining of the American Arbitration Association; provided that neither party shall initiate arbitration proceedings until the expiration of thirty (30) days after notice of such dispute, controversy or claim shall have been given to the other party. Judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction." (10a-39)

Because of Island Creek's failure to deliver the coal specified in the years 1970 and 1971 and an inability of the parties to reach agreement both as to damages to be paid for this failure and as to Island Creek's future obligations to deliver coal, IKEC decided to submit these questions to arbitration under Article VI, Section 12.

On or about May 20, 1971, Robert C. Maynard, attorney for IKEC, sent to James G. Park, one of the attorneys for Island Creek, a proposed draft of a joint submission agreement raising these issues. That draft contained no reference to termination of the Coal Supply Agreement nor to any alleged right of Island Creek to terminate it (52a). In response to this draft, Mr. Park returned a revised form of submission agreement together with a covering letter, dated May 25, 1971, in which he stated ". . . we believe that Island Creek has the right to terminate and have amended the submission accordingly" (52a, 55a).

The amendments referred to in that letter are the ones directly involved in this case and on this appeal. The revised submission agreement contained the following two paragraphs drafted by Island Creek (53a):

> "Island Creek also contends that it is entitled to terminate its contract with IKEC under the provisions of Article IV, Section 6. To the extent that termination under Article IV, Section 6 is not available from the first day on account of which IKEC claims damages, Island Creek asserts its right to be excused from performance under the force majeure clause of the contract and under Article 2-615 of the Uniform Commercial Code.
>
> "Further, Island Creek asserts that a hardship has occurred whereby Island Creek is prevented from developing the Hamilton No. 1 Mine as planned because of matters beyond its control, namely, government regulations and legislative action, that IKEC has refused to recognize the same, and that therefore the contract should either be equitably adjusted by amendment or terminated." (15a)

In addition, this revised draft contained the language, inserted by Island Creek, "Remedy sought by Island Creek: Termination" (15a, 53a).

With one additional change, not relevant here, this revised form of submission agreement became the Submission. Article IV, Section 6, of the Coal Supply Agreement referred to in the Submission as the principal basis for Island Creek's alleged right to terminate and the provision relied upon by Island Creek in this action provides, in pertinent part:

> "The parties hereto also recognize the possibility that, during the continuance of this Agreement, legis-

lative or regulatory bodies or the courts may impose regulations or restrictions relating to mining practices which will make it impossible or impractical for Seller to continue to produce coal for delivery hereunder. Such regulations or restrictions could pertain to, but would not necessarily be limited to, air pollution, water pollution, waste disposal or surface subsidence. If any such regulations or restrictions are imposed and if as a result thereof Seller in its sole judgment decides that it will be impossible or impractical for Seller to continue to produce coal for delivery hereunder, Seller shall so advise Buyer and thereupon Seller and Buyer shall promptly consider what corrective steps they can take in the mining and preparation of the coal at Seller's mine and in the handling and combustion of the coal at Buyer's plant; and if in Seller's sole judgment such steps will not, without unreasonable expense to Seller, make it possible for Seller to continue to produce coal for delivery hereunder without violating such regulations or restrictions, Seller shall have the right, upon notice to Buyer, to terminate this Agreement without further obligation to Buyer hereunder; provided, however, that Buyer may, at its option, prevent such termination by agreeing to reimburse Seller for such expense to the extent that Seller, in its sole judgment, deems such expense to be unreasonable." (10a-14)

It is clear, and Island Creek has not disputed, that the recital of its alleged right to terminate the Coal Supply Agreement under Article IV, Section 6, was based upon the passage of the Health and Safety Act which became effective on March 30, 1970, over fourteen months prior to the Submission. Shortly after the date of passage of that

Act, Island Creek began to make claims for price increases and, as early as September 16, 1969, raised the question of the applicability of Article IV, Section 6, to alleged increased costs arising out of compliance with its provisions (58a, 61a-62a).

The relationship between the Health and Safety Act and Article IV, Section 6, remained a source of dispute between the parties (72a) and engendered a great deal of correspondence and one interim agreement, a pricing agreement, prior to June 10, 1971 (59a, 61a-89a). Thus Island Creek's insertion in the Submission of a claim to a right to terminate was perfectly consistent with its assertions up to that time and reflected the position it had taken in its dispute with IKEC.

Subsequently, by its letter dated July 20, 1972, Island Creek, apparently having decided to try to circumvent the arbitration, again asserted the alleged right to terminate under Article IV, Section 6, which it had previously submitted to arbitration (10a-49). By letter dated January 25, 1973, John Lansdale, one of the attorneys for IKEC, wrote to inform the Cleveland Regional Office of the American Arbitration Association of Island Creek's unilateral action and to advise them that IKEC wished the panel of arbitrators to specifically dispose of this new attempt to terminate and stated that, in IKEC's view, the purported termination was not made as a result of the imposition of regulation of the kind referred to in Article IV, Section 6 (13a).

Shortly thereafter, Island Creek commenced the instant action.

ARGUMENT

The decision of Judge Bauman that under the Submission of June 10, 1971, Island Creek agreed to arbitrate the very question which it now seeks to remove from arbitration was required by the clear and unambiguous language of the Submission. Moreover, although it was unnecessary for the Court below to rule upon other grounds advanced by IKEC as bases for dismissal of this action, it is submitted that those grounds as well support the holding of the District Court.

POINT I

Island Creek Submitted to Arbitration the Question of Its Rights to Terminate the Coal Supply Agreement.

Island Creek's brief on this appeal consists largely of a recitation of general legal propositions which are, in the main, unexceptionable. The principles stated, however, have very little to do with the facts in this case. The Submission clearly and unambiguously submitted to arbitration the question of Island Creek's right to terminate under Article IV, Section 6. The only rational interpretation of the Submission was the one given it by Judge Bauman.

The Submission contained the following relevant provisions:

(1) It provided that the parties "hereby submit the following disputes to arbitration under the Commercial Arbitration Rules of the American Arbitration Association . . ." without in any respect limiting the arbitrators' authority to that which they would otherwise have had under the contract. (14a)

(2) One of the contentions of Island Creek defined in the Submission Agreement, and submitted to arbitration thereby was:

"It contends that the Federal Mine Health and Safety Act of 1969 has made it impossible or impractical for Island Creek to produce at its Hamilton No. 1 Mine and deliver to IKEC the total quantity of coal stated in the contract for the years 1970 and 1971 and that it has been forced to prorate its production from that mine among its long-term contract customers of that mine." (14a-15a)

(3) An additional contention of Island Creek was defined as follows:

"Island Creek also contends that it is entitled to terminate its contract with IKEC under the provisions of Article IV, Section 6." (15a)

(4) The remedy sought by Island Creek was defined as follows:

"Remedy Sought by Island Creek: Termination." (15a)

These provisions are flatly inconsistent with Island Creek's present contention that the reference to Article IV, Section 6 was intended only "to indicate to the arbitrators that in said Agreement the defendant had been allocated the risk of governmental regulation" (19a; Plaintiff's Brief, p. 5). The Submission Agreement in no way indicates that the reference to Article IV, Section 6 was purely evidentiary. Rather it sets out plaintiff's contention that it "is entitled to terminate its contract with IKEC under the provisions of Article IV, Section 6." Moreover, if Island

Creek had intended only to submit questions arising under Article IV, Section 6 in a defensive way, to meet IKEC's claim based on short deliveries, it would not have needed to demand any remedy at all. That Island Creek was seeking prospective relief, as well as asserting a defense, is confirmed, not only by its request for the remedy of termination, but also by its additional statement in the Submission Agreement that "the contract should either be equitably adjusted by amendment or terminated" (15a).

Judge Bauman specifically disposed of this contention of Island Creek's in the following language:

> "The explanation proffered by Island Creek is that 'the inclusion of reference to Article IV, §6 was intended by the plaintiff to indicate to the arbitrators that in said Agreement the defendant had been allocated the risk of governmental regulation.' That might be charitably characterized as a *post hoc* rationalization; in any case, it finds no support in the wording or the structure of the submission agreement. Equally untenable is plaintiff's assertion that it sought termination only under the *force majeure* clause of the supply agreement and under Article 2-615 of the Uniform Commercial Code. On the contrary, Article IV, §6 is asserted as the principal basis for termination; the reference to other alleged bases is clearly meant to supplement this argument." (95a-96a)

While plaintiff now attempts to upgrade its contentions based on impossibility, impracticability, Article 2-615 of the Uniform Commercial Code, and hardship and indicates that the reference to Article IV, Section 6 was merely evidentiary of those claims, the Submission Agreement unambiguously did quite the opposite. The claim under Article

IV, Section 6 was presented as the principal basis for termination, with the other arguments merely supportive of, or supplementary to that principal argument.

Parties to a dispute may at any time submit the dispute to arbitration, whether or not it falls within the terms of a pre-existing agreement to arbitrate future disputes, and, indeed, whether or not the parties have ever agreed to arbitrate future disputes at all. *Ficek* v. *Southern Pacific Company,* 338 F.2d 655, 656-57 (9th Cir. 1964), *cert. denied,* 380 U.S. 988 (1965); *Amicizia Societa Nav.* v. *Chilean Nitrate & Iodine S. Corp.,* 274 F.2d 805, 809 (2d Cir.), *cert. denied,* 363 U.S. 843 (1960).

When the parties have executed a submission agreement, it is the terms of that agreement, not some unexpressed intention of one of the parties, which controls the scope of the submission. A submission agreement is a type of contract and is subject to all of the rules of interpretation that govern contracts in general. *Charlotte City Coach Lines, Inc.* v. *Brotherhood of Railroad Trainmen,* 254 N.C. 60, 118 S.E.2d 37 (1961). Indeed, a submission agreement is normally, and is in this case, an integrated agreement which cannot be varied or altered by parole evidence. *Cf. Oregon Pacific Forest Products Corp.* v. *Welsh Panel Co.,* 248 F.Supp. 903 (D. Ore. 1965), *William B. Logan & Assoc.* v. *Monogram Precision Indus.,* 184 Cal.App.2d 12, 7 Cal. Rptr. 212, 215 (1st Distr. 1960).

Nor can Island Creek avoid the language of the Submission by its contention that, when the Submission was executed, there was no "existing controversy". That contention flies in the face of the undisputed facts of this case. As noted previously, Island Creek had begun to assert claims based on Article IV, Section 6 and the Health and Safety Act as early as September 16, 1969. IKEC had continually disputed these claims (72a). The fact of Island

Creek's insistence that its claim based on Article IV, Section 6 and its alleged right to terminate be specifically included in the Submission is evidence enough that it thought a dispute existed.

Even if the contention could be swallowed that the termination attempt on July 20, 1972 was somehow different from the issue of termination submitted to arbitration of June 10, 1971, arbitration of the controlling issues would still be required.

There is no question that both the claimed right to terminate asserted in the Submission and the claimed right to terminate asserted on July 20, 1972 and thereafter were based on extra expenses caused by compliance with a federal statute which became effective March 30, 1970. In these circumstances the courts would be foreclosed by an arbitration award from reconsideration of the issues presented and decided in the course of the arbitration. An arbitration award is *res judicata* as to all issues submitted. *Gardner* v. *Shearson, Hammill & Co.*, 433 F.2d 367 (5th Cir. 1970), *cert. denied,* 401 U.S. 978 (1971); *James L. Saphier Agency, Inc.* v. *Green,* 190 F. Supp. 713 (S.D.N.Y.), *aff'd,* 293 F.2d 769 (2d Cir. 1961). Thus, if, for example, the arbitrators concluded that the Health and Safety Act did not increase the cost of mining coal, a court would be powerless to reconsider that question. It is evident that the Submission precludes a court from considering or resolving the issues relating to Island Creek's alleged right to terminate.

There can be no dispute that the Coal Supply Agreement and the Submission fall within the provisions of the Federal Arbitration Act, 9 U.S.C. §§1 *et seq.* (1970) (hereinafter the "Arbitration Act"). The subject of the Agreement involves "commerce" as that term is defined in Section 1 of the Arbitration Act, 9 U.S.C. §1, and both the Agreement

and the Submission are declared to be "valid, irrevocable and enforceable" agreements by Section 2 of the Arbitration Act, 9 U.S.C. §2.

In deciding the question of arbitrability under the Arbitration Act, "federal policy [is] to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by this language, and to resolve disputes in favor of arbitration. . . ." *Metro Industrial Painting Corp.* v. *Terminal Construction Co.*, 287 F.2d 382, 385 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961). See also *Coenen* v. *R.W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972); *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *dismissed by stipulation*, 364 U.S. 801 (1960).

As the Court stated in *Galt* v. *Libbey-Owens Ford Glass Co.*, 376 F.2d 711, 714 (7th Cir. 1967):

> "The policy of the Federal Arbitration Act is to promote arbitration in accord with the intention of the parties and to ease court congestion. Robert Lawrence Company v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959), certiorari dismissed; 364 U.S. 801, 81 S.Ct. 27, 5 L.ED., 2d 37. All doubts are to be resolved in favor of arbitration. Metro Industrial Painting Corp. v. Terminal Construction Co., 287 F.2d 382, 385 (2d Cir. 1961). Whenever possible, the courts will use the Federal Arbitration Act to enforce agreements to arbitrate. See Monte v. Southern Delaware County Authority, 321 F.2d 870, 874 (3d Cir. 1963)."

See also *Federal Commerce & Nav. Co.* v. *Kanematsu-Gosho Ltd.*, 457 F.2d 387 (2d Cir. 1972).

The language of the Submission and the strong federal policy favoring arbitration compel the conclusion reached

by the Court below that the issues involved here are arbitrable.

POINT II

Article IV, Section 6 of the Contract Does Not Place Within Island Creek's Sole Judgment All of the Matters Involved in Its Purported Termination of the Contract.

Although it was not necessary for the District Court to reach the issues discussed below, which were raised by IKEC, it is submitted that they too would require dismissal of Island Creek's complaint.

(A) *Article IV, Section 6 Does Not Commit the Question of Causation to Island Creek's Sole Discretion*

If it had been the intention of Article VI, Section 12, the general arbitration clause of the Coal Supply Agreement, to exclude from arbitration any issue arising under Article IV, Section 6, that could easily have been done, merely by cross-reference to the earlier provision. The arbitration clause was not, however, written in that fashion. It carefully provided that the only issues removed from arbitration were those "expressly stated herein to be within the sole judgment of one of the parties hereto . . . ." Thus, only those questions or issues referred to in Article IV, Section 6 which were "expressly stated" to be within the sole judgment of a party were excluded from arbitration.

A reading of Article IV, Section 6 makes clear that not every question involved in a termination or purported termination under that section was expressly committed to a party's sole judgment. It was not the intention of that section to allow a party to terminate arbitrarily without some mechanism for determining whether the prerequisites to termination existed.

In its opening language Article IV, Section 6 refers to "regulations or restrictions relating to mining practices which will make it impossible or impractical for Seller to continue to produce coal for delivery hereunder." Then, in language which is crucial to Island Creek's contentions, Section 6 goes on to say:

> "If *any such regulations or restrictions* are imposed and *if as a result thereof* Seller in its sole judgment decides that it will be impossible or impractical for Seller to continue to produce coal for delivery hereunder, Seller shall so advise Buyer. . . ."

This language makes it clear that the prerequisites for the Seller making the judgment it is allowed by this paragraph to make are (1) that regulations or restrictions of the kind defined in paragraph 6 have been imposed and (2) that the Seller's judgment is a result of those regulations or restrictions.

Thus, the first question is whether regulations or restrictions of the kind contemplated by this section have been imposed; that determination was not left to the sole judgment of the Seller. It cannot unilaterally decide that regulations falling within the definition have been imposed; that is for the arbitrators.

Second, while it is left to the Seller to decide whether it will be impossible or impractical to continue to produce coal, it was left to the arbitrators to decide whether the impossibility or impracticality, and the Seller's decision, resulted from the regulations or restrictions complained of. It was obviously necessary to refer this to the arbitrators in order to prevent the Seller from being able to terminate arbitrarily when the difficulties in production were caused by factors quite independent of any regulations or restrictions which had been adopted.

Moreover, the concluding language of Article IV, Section 6 also defines an area in which the arbitrators have an obvious and necessary role to play. The section contemplates that once the Seller has advised the Buyer that delivery of the coal is impossible or impractical, the parties will consider corrective steps. If "such steps" will not, without "unreasonable expense" to Seller, make it possible to deliver, he may still terminate, but only subject to the following proviso:

> ". . . provided, however, that Buyer may, at its option, prevent such termination by agreeing to reimburse Seller for such expenses *to the extent that Seller, in its sole judgment, deems such expense to be unreasonable.*"

This language carves out as an area where Seller's "sole judgment" is to operate the determination of the "extent" to which the increased expense is "unreasonable." It is submitted that the contract does not place within the sole judgment of the Seller the determination what the increased expense is. Thus, it is not open to Island Creek to demand, under this provision, some astronomical sum to avoid termination when the increased expense is, in fact, minimal. IKEC is entitled to have a panel of arbitrators determine what the added expense is; only the determination of what proportion of that expense is unreasonable is for Island Creek to make in its "sole judgment." If, for example, IKEC were willing to pay the entire increased expense shown to have been incurred, termination could be prevented.

Again these are obviously arbitrable issues.

(B) *Article IV, Section 6 Is Not Invoked by Legislation Relating to Mine Safety*

Legislation and regulation relating to mine safety is no new thing. Federal legislation dates back at least to the

Federal Coal Mine Safety Act of 1952, 30 U.S.C. §§471 *et seq.* (1970), and state regulation has also long been common. Intensive regulation of the ecological consequences of mining, however, have been a more recent phenomenon.

The examples of regulations or restrictions set forth in Article IV, Section 6 of the Agreement are "air pollution, water pollution, waste disposal or surface subsidence." All of these are ecological in nature. It is submitted that Article IV, Section 6 was not intended to encompass every conceivable sort of governmental regulation which might impinge upon mining; rather, it was intended to apply only to types of regulation of the same general character and nature as those specifically listed.

Although Article IV, Section 6, at its outset, uses apparently all-inclusive terms ("Such regulations or restrictions could pertain to, but would not necessarily be limited to . . . .") it is submitted that proper construction of this Section under the doctrine of *ejusdem generis* results in the conclusion that the other subjects or "regulations or restrictions" were intended by the parties to be of substantially the same nature as the specific examples given. This is the general rule of contract interpretation, 3 Corbin, *Contracts,* §552 (rev. ed. 1960); 17A C.J.S., *Contracts,* §313 (1963); 17 Am. Jur. 2d, *Contracts,* §270 (1964). There is absolutely no indication here that the parties intended otherwise. If the parties had intended health and safety regulations, of a kind with which they had long been familiar, to fall within Article IV, Section 6 it must be presumed that they would have so stated clearly and unambiguously.

In *Austin Co.* v. *United States,* 314 F.2d 518, 161 Ct. Cl. 76, *cert. denied,* 375 U.S. 830 (1963), a contractor sued the

United States for expenditures in trying to develop a "Digital Data Recording and Transcribing System" in which efforts it was unsuccessful. The Government cancelled the contract and the contractor claimed that it should be reimbursed because its failure to perform was "due to causes beyond the control and without the fault or negligence of the Contractor." Another clause in the contract provided:

> "(b) The Contractor shall not be liable for any excess costs if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes . . . ." 314 F.2d at 519.

The Court of Claims held that the nonperformance clause in the contract, under the rule of *ejusdem generis,* did not excuse the contractor's failure to perform because that failure was not due to "the kind or class of extraneous contingencies enumerated therein."

The rule of *ejusdem generis* is applied generally in every jurisdiction. In *Pres. and Directors of Manhattan Co.* v. *Erlandsen,* 36 N.Y.S.2d 136 (Sup. Ct. Queens Co. 1942), *aff'd,* 266 App. Div. 883, 43 N.Y.S.2d 639, *motion for leave to appeal denied,* 266 App. Div. 924, 44 N.Y.S.2d 471 (2d Dept. 1943), the court held that a trustee was liable where it invested in unguaranteed first mortgages rather than "guaranteed first mortgages or guaranteed first mortgage certificates" as specified in the trust even though a provi-

sion of that trust allowed the trustee to invest generally "in such other securities as may be legal for the investment of trust funds" because the court found the terms of the trust agreement reflected an intent of the settlor to invest in mortgage securities only if guaranteed. The court stated:

> "It is a primary rule of construction that where general words follow particular or specific terms, such general words are limited by the particularization. The basis upon which such rule is formulated is predicated upon the fact that usually the minds of parties are addressed especially to the items upon which they have particularized, and consequently the particularization prevails over the generalities." 36 N.Y.S.2d at 138.

In *Real Estate—Land Title & Trust Co.* v. *Bankers' Trust Co.*, 104 Pa. Super., 158 A. 634 (1932) the court, employing the doctrine of *ejusdem generis,* held the following clause in a mortgage not to include furniture and other personalty even though the general words used were clearly broad enough to encompass them:

> "Together with all machinery, including engines, boilers, dynamos, elevators, refrigerators, incinerators, steam and electric fixtures and appliances and all fixtures and other property generally now or which may hereafter be placed in or about said premises and appurtenant thereto, or used in connection therewith for the operation of the building as an apartment house." 158 A. at 634-35.

See also *Pennsylvania Turnpike Com'n* v. *United States F. & G. Co.,* 343 Pa. 543, 23 A.2d 416 (1942).

In *Union Bankers Insurance Co.* v. *National Bank of Commerce,* 241 Ark. 554, 408 S.W. 2d 898 (1966) the court applying the doctrine of *ejusdem generis,* construed the

term "digestive tract" in an exclusionary clause in a medical insurance contract to mean only "stomach" because of a specific reference in the clause to stomach ulcer.

In *Cronkhite* v. *Falkenstein,* 352 P.2d 396 (Okl. 1960), the court held, through application of the doctrine of *ejusdem generis,* that the term "oil, gas and other minerals" did not include gypsum, although gypsum is unquestionably a mineral and one of commercial value, because it is not similar in nature to oil and gas. The court cited and relied on the case of *Wolf* v. *Blackwell Oil & Gas Co.,* 77 Okl. 81, 186 P. 484 (1920) where the term "all oil and other minerals" was held not to include gas. To the same effect see *Atwood* v. *Rodman,* 355 S.W.2d 206 (Tex.Ct. App. 1962).

In *Smith* v. *Second Church of Christ, Scientist, Phoenix,* 87 Ariz. 400, 351 P.2d 1104 (1960), the term "no barns, garages or other buildings whatsoever" was held not to include a church because, applying the doctrine of *ejusdem generis,* a church is not in the same category as garages and barns.

See also *G. T. Schjeldahl Co.* v. *Local Lodge 1680, I.A.M.,* 393 F.2d 502, 503 (5th Cir. 1968) (". . . a subsequent specification impliedly limits the meaning of a preceding generalization."); *Brotherhood of Ry. and Steamship Clks.* v. *Railway Express Agency,* 238 F.2d 181, 184 (6th Cir. 1956) ("Under the rule of *ejusdem generis,* where no intention to the contrary appears, general words after specific terms are confined to things of the same kind with the things previously described and specified.").

It is submitted that none of the above cases involved terms any more ambiguous or inconsistent with the enumeration than "regulations and restrictions relating to mining practices." In each case the doctrine of *ejusdem*

generis was applied, as it should be here, to reach the result intended by the parties as evidenced by the enumeration.*

There is one additional aspect of this issue which should be weighed. Even assuming, *arguendo,* that a court might decide that the application of the doctrine of *ejusdem generis* is not mandated, it would still be rational and within the power of the arbitrators to apply it in interpreting the Coal Supply Agreement—and such interpretation is the key role of arbitrators. Interpretation of the Coal Supply Agreement by a panel of arbitrators was precisely what the parties bargained for.

It is submitted that if a panel of arbitrators did so interpret the instant contract, an award rendered on this basis would have to be confirmed. *Wilko* v. *Swan,* 346 U.S. 427 (1953); *Saxis Steamship Co.* v. *Multifacs International Traders, Inc.,* 375 F.2d 577, 582 (2d Cir. 1967) and cases cited therein. Accordingly, upon this ground as well, Island Creek's complaint was subject to dismissal.

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* Plaintiff's argument below that not all of the items enumerated in Article IV, Section 6 were ecological in nature is little more than frivolous. Surface subsidence is an ecological factor, though having economic aspects as all ecological factors do, because it prevents land use.

CONCLUSION

For the foregoing reasons it is submitted that the decision of the District Court below should be affirmed in all respects.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

ISLAND CREEK COAL SALES COMPANY,

Plaintiff

-against-

INDIANA KENTUCKY ELECTRIC CORP.

- -x

74-1329

ROBERT R. CAWTHRA, being duly sworn deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 7th day of June, 1974, I caused two copies of the BRIEF OF APPELLE INDIANA KENTUCKY ELECTRIC CORP. to be hand delivered to Messrs. PHILIPS NIZER BENJAMIN KRIM & BALLON at their offices, 40 West 57th Street, New York, New York 10019.

Robert R Cawthra

Sworn to before me this

7th day of June, 1974

David G. Morrow

DAVID G. MORPOW
Notary Public, State of New York
No. 31-4514749
Qualified in New York County
Commission Expires March 30, 1975